IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DAVID KUNKLE, GLADYS BOX, BILLY B. BRITT, PATRICIA BUSCH, H. RICHARD CHARTER AND EILEEN CHARTER LIVING TRUST, JOHN COCORES, DAVID GEORGE EKMAN, RICHARD ERICKSON, EMERALD CELLULAR, a Massachusetts Corporation, GLOBAL CELLULAR, d/b/a ARAP II PARTNERS, OM PARKASH KALRA, JAMES P. KENNEDY, LEE E. McDONALD, HAROLD J. MYERS, KENNETH L. RAMSEY, HAROLD W. SWART, TERINO GENERAL PARTNERSHIP, VICTOR LEE REVOCABLE TRUST, PIONEERS IN CELLULAR TECHNOLOGY, and GEORGE R. GORDON, Appellants, vs. WESTERN WIRELESS CORPORATION, a Washington corporation, BILLINGS CELLULAR CORPORATION, a Montana Corporation, WWC MIDLAND CORPORATION, a Delaware corporation, WWC HOLDING COMPANY, INC., a Delaware corporation, WWC TEXAS LICENSE CORPORATION, a Delaware corporation, JOHN W. STANTON, THERESA E. GILLESPIE, DONALD GUTHRIE, ALAN R. BENDER, MIKAL J. THOMSEN, JEFFREY A. CHRISTIANSON, SCOTT HOPPER, DAVID MILLER, BOB CHAUDHURI, WARREN LINNEY, JOHN L. BUNCE, JR., MITCHELL R. COHEN, and HELLMAN & FRIEDMAN LLC, Respondents.	)	DIVISION ONE No. 55067-5-I (Consolidated with No. 55164-7-I) **UNPUBLISHED OPINION** FILED: June 19, 2006

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BAKER, J. — This case involves a challenge to business dealings between respondent Western Wireless Corporation (WWC) and appellant minority shareholders in three of WWC's subsidiaries. Appellants allege that WWC breached various fiduciary duties, violated the partnership agreements, and committed fraudulent concealment by secretly initiating a complex scheme to misappropriate the combined assets of the subsidiaries in order to fund and develop a multi-billion dollar wireless empire, then illegally eliminating the minority shareholders' interests. The trial court granted summary judgment to WWC on all of these claims, and also granted WWC's CR 12(b)(6) motion to dismiss appellants' Washington State Securities Act[1] (WSSA) claim. We affirm.

I.

WWC is a Washington corporation that manages many local companies that provide cellular phone service in the western United States. The appellants are individual investors who held small minority interests in at least one of three former WWC subsidiaries: Billings Cellular Partnership, located in Billings, Montana; Midland Cellular Telephone Company, located in Midland, Texas; and Sioux Falls Cellular Corporation, located in Sioux Falls, South Dakota. Appellants obtained their fractional interests in the 1980s through an FCC lottery for new local cellular phone operating licenses. After these licenses were awarded to groups of investors, Billings was formed as a Montana partnership, Midlands as a Delaware partnership, and Sioux Falls as a Delaware corporation.

[1] Ch. 21.20 RCW.

Because the FCC awarded hundreds of licenses, each of which covered a small geographic area, the cellular industry quickly began to consolidate. By the early 1990s, General Cellular Corporation (GCC) was the majority owner of Midland and Sioux Falls, and Pacific Northwest Cellular (PNC) was the majority owner of Billings. PNC was formed by John Stanton, Theresa Gillespie, and Mikal Thomson. In 1991, Stanton and his business associates discovered that GCC was headed for bankruptcy, and they negotiated a reorganization plan for GCC that was approved by the bankruptcy court.[2] In 1994, PNC, GCC, and other companies merged to form WWC. As a result, Billings, Midland, and Sioux Falls became majority-owned subsidiaries of WWC. WWC used a centralized cash management system for all revenues, expenditures, and financing of WWC and its subsidiaries, advancing funds to them in early years when they were not profitable, and retaining positive cash flow in later years until it was ultimately distributed. WWC allocated the cost of certain equipment among the subsidiaries, but did not charge the subsidiaries management fees or administrative costs, and did not require them to fund operations through capital calls. WWC had its consolidated books and records audited annually, and prepared unaudited financial statements for the subsidiaries based on these audited materials. WWC also held regular partner and shareholder meetings for each subsidiary and invited all minority owners to attend, but few did.

[2] Investment firm Hellman & Friedman, which participated in these negotiations and obtained an interest in GCC, was a defendant at the trial court below, but not in this appeal.

Throughout the 1990s, WWC made blanket offers to purchase minority interests in its subsidiary companies. WWC was candid about its desire to acquire 100 percent ownership of its subsidiaries, a strategy that presented the opportunity for significant cost savings. Many minority owners voluntarily sold their interests, but appellants did not.

In 1994, WWC negotiated a line of credit in the amount of $325 million from Toronto Dominion Bank (the "TD Credit Facility") to fund its operation and growth. In 1995, WWC increased the TD Credit Facility to $750 million, and in 1996 to $950 million. To obtain the TD Credit Facility, WWC pledged a security interest in its assets and those of its wholly and non-wholly owned subsidiaries. However, the loan agreement included a "Maximum Guaranteed Amount" clause limiting the pledge of non-wholly owned subsidiary assets to amounts received directly or indirectly from the loan. After minority owners Robert Chaudhuri and Warren Linney objected to this pledge of assets, WWC bought out their interests and had them sign a confidentiality agreement.

In 1994, the FCC began auctioning a new kind of wireless operating license called a broadband Personal Communications Services (PCS) license. PCS operates on a different frequency than cellular and is more suitable for urban markets. WWC formed a subsidiary called Western PCS Corporation, later renamed VoiceStream, to participate in the FCC auctions. WWC relied on various sources to purchase PCS licenses, including the TD Credit Facility and individual investors, in addition to a bank credit facility and public bonds

obtained by VoiceStream. VoiceStream was spun off from WWC in 1999 and purchased by Deutch Telekom in 2001.

In 1996, WWC made an initial public offering of stock while also selling bonds on the public market, with net proceeds totaling approximately $440 million. That same year, Billings and Midland began generating net income for the first time, which created tax liabilities. Accordingly, WWC's director of taxation proposed restructuring Billings as a corporation and Midlands as a limited partnership. WWC provided minority shareholders with notice of upcoming meetings to discuss corporate restructuring. The notice stated that "[t]he change is proposed for the purpose of capturing tax savings and will not change the ownership of any minority partner." With the exception of appellant McDonald, who objected to the restructuring, no minority owners appeared at these meetings. This restructuring was approved by more than two-thirds of the ownership interests in 1997.

In 2000, WWC merged the three non-wholly owned subsidiaries into itself via statutory short-form merger for Billings and Midland and a reverse stock split for Sioux Falls. The minority owners received notification that the mergers had occurred, and WWC tendered payment for the cancelled shares. Although the minority shareholders had no statutory right to prevent these mergers, the short-form merger statute permitted the minority owners of Billings and Midland to dissent and demand a judicial determination of the fair value of their interests.[3]

[3] Some Billings and Midland minority owners dissented, and appraisal actions are pending in Delaware and Montana. Therefore, value is not at issue

The minority owners each received sizable returns relative to their modest initial investments.

Appellants sought advice of counsel in late 2000. On September 13, 2002 the Billings and Midland plaintiffs filed suit against WWC, followed by the Sioux Falls plaintiffs on November 20, 2002. These cases were subsequently consolidated. Appellants claimed that WWC committed various breaches of fiduciary duty, breach of contract, fraud, and violations of the WSSA by secretly and illegally leveraging the non-wholly owned subsidiaries' assets to build a multi-billion dollar wireless network, and then forcing appellants out for a fraction of the true value of their rightful interests. The trial court granted WWC's CR 12(b)(6) motion regarding the WSSA claims, and granted WWC's motion for summary judgment on the remaining claims based on the statute of limitations and on the merits. This appeal followed.

II.

A motion for summary judgment is reviewed de novo.[4] Summary judgment is appropriate "only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law."[5]

Statute of Limitations. Appellants first contend that the trial court erred

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in this case. The Sioux Falls minority owners do not have appraisal rights pursuant to the reverse stock split mechanism, but Delaware common law provides a comparable right of dissent and valuation. Applebaum v. Avaya, Inc., 812 A.2d 880 (Del. 2002).

[4] Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

[5] CR 56(c); Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

in dismissing claims arising from alleged WWC misconduct prior to September 12, 1999 and November 19, 1999 under Washington and Delaware's three-year statutes of limitation.[6] The trial court ruled that the discovery rule did not toll the statutes of limitation because appellants were given notice of all WWC actions that allegedly constituted misconduct prior to 1999 and because they failed to act with due diligence in exploring the potential consequences of WWC's actions.

The limitations period begins to run when the plaintiff's cause of action accrues.[7] "The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim."[8] The plaintiff must show that the relevant facts could not have been discovered earlier.[9] This is a question for the jury "[u]nless the facts are susceptible of only one reasonable interpretation."[10]

Appellants assert that the discovery rule applies because WWC's vague and deceptive accounting practices and inadequate meeting notices prevented them from discovering its nefarious plan until they retained counsel following the 2000 mergers. They contend that due diligence does not apply because they

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[6] RCW 4.16.080; 10 Del. Code Ann. § 8106. The sole exception was the Billings contract claim, which the parties agree is governed by Montana's eight-year limitations period because of a choice of law provision in the Billings partnership agreement. Mont. Code Ann. § 27-2-202.

[7] Malnar v. Carlson, 128 Wn.2d 521, 529, 910 P.2d 455 (1996).

[8] Giraud v. Quincy Farm & Chem., 102 Wn. App. 443, 449, 6 P.3d 104 (2000).

[9] Giraud, 102 Wn. App. at 449.

[10] Giraud, 102 Wn. App. at 450.

were entitled to rely on WWC to act in good faith consistent with its fiduciary duties, and because Montana and Delaware do not require due diligence in the fiduciary context.[11] We disagree. The 1994 TD Credit Facility stated that the assets of the subsidiaries were being pledged as security; the financial statements were clearly marked as "unaudited"; appellants knew they were not receiving distributions of net income as early as 1995; and the Billings and Midland appellants were sufficiently notified that the 1997 restructuring converted them from partners to shareholders. Mere allegations of fraud do not toll the statute of limitations, nor does the existence of a fiduciary relationship automatically invoke the discovery rule. WWC's fiduciary duty to notify minority interests of its business decisions does not encompass a paternalistic requirement to analyze and discuss in detail every possible future legal consequence of those decisions.

Appellants Kunkle and Kennedy argue for the first time on appeal that under Washington's "borrowing statute," all of the Billings claims are subject to Montana's eight-year limitations period and all of the Midland and Sioux Falls claims are subject to Delaware's limitation rules.[12] RCW 4.18.020(1) provides that if a claim is substantively based on the law of another state, then the limitation period of that state applies. Washington law applies presumptively

[11] Estate of Carolyn Watkins v. Hedman, Hileman & Lacosta, 91 P.3d 1264, 1270 (Mont. 2004); Skierka v. Skierka Bros., 629 P.2d 214, 217 (Mont. 1981); Kahn v. Seaboard Corp., 625 A.2d 269, 275-76 (Del. Ch. 1993).

[12] We exercise discretionary authority to hear this argument. RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

where there is no conflict of law.[13] The Billings and Midland partnership agreements include a choice of law provision establishing that Montana and Delaware law, respectively, govern "this Agreement and the rights of the parties hereunder." However, "a choice of law provision in a contract does not govern tort claims arising out of the contract."[14] In this case, there is no conflict of substantive tort law between Washington and Montana or Delaware;[15] therefore, Washington's statute of limitations applies.

Appellants further argue that the Midlands and Sioux Falls claims should be governed by the doctrine of laches, which bars stale equitable claims, rather than by the statutes of limitation. The elements of laches are: (1) knowledge or reasonable opportunity to discover the cause of action; (2) unreasonable delay in commencing the cause of action; and (3) damage to the defendant resulting from the delay.[16] We do not accept appellants' argument that they could not have known of their claims prior to the 2000 mergers. Appellants' delay deprived WWC of the opportunity to address the alleged problems. Thus, even if we applied the doctrine of laches, these claims would be barred.

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[13] Rice v. Dow Chem. Co., 124 Wn.2d 205, 210, 875 P.2d 1213 (1994).

[14] Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 159, 744 P.2d 1032, 750 P.2d 254 (1987).

[15] RCW 25.05.165; Mont. Code Ann. § 35-10-405; 6 Del. Code Ann. § 15-404; Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Ski Roundtop ex rel. Ski Yellowstone v. Hall, 658 P.2d 1071 (Mont. 1983).

[16] Buell v. Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The laches test in Delaware is virtually identical to Washington's. Tafeen v. Homestore, Inc., 2004 Del. Ch. LEXIS 38, 31 (Del. Ch. Mar. 16, 2004).

Breach of Fiduciary Duty. Appellants contend that WWC committed numerous breaches of fiduciary duty. Breach of fiduciary duty is a tort. In determining which state's law governs in a tort case, the court employs a "most significant relationship" standard to "evaluate the contacts of the interested jurisdictions with respect to the claims at issue and the interests and policies of those jurisdictions."[17] WWC is a Washington corporation and the alleged tortious acts occurred in Washington; therefore, to the extent that there is a conflict, Washington law applies.

It is undisputed that WWC owed appellants fiduciary duties of good faith, care, and loyalty as a partner with the minority shareholders in Billings and Midland and a majority shareholder in Sioux Falls.[18] In the parent-subsidiary context, individuals acting in a dual capacity as directors of two corporations must act in the good faith best interest of both entities.[19] When the parent has received a benefit to the exclusion and at the expense of the subsidiary, the "intrinsic fairness" rule requires the parent to prove that its transactions were objectively fair.[20] "Self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary."[21]

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[17] Haberman, 109 Wn.2d at 134.

[18] Hsu Ying Li v. Tang, 87 Wn.2d 796, 801, 557 P.2d 342 (1976); Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 386 (Del. Ch. 1999).

[19] Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983).

[20] Sinclair Oil Corp., 280 A.2d at 720.

[21] Sinclair Oil Corp., 280 A.2d at 720.

As an initial matter, appellants argue that the trial court erred in applying the business judgment rule in evaluating and dismissing their claims. The business judgment rule immunizes corporate management from liability where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.[22] If the presumption of the business judgment rule is rebutted by evidence that the directors breached their fiduciary duties, the burden shifts to the defendant to prove the "entire fairness" of the transaction.[23] We need not analyze this issue because we hold that appellants have failed to show that WWC breached its fiduciary duties even in the absence of the business judgment rule.

First, appellants contend that WWC's centralized cash management system and unaudited financial statements breached its duty of loyalty and constituted self-dealing by allowing it to conceal its activities from the minority shareholders. However, there was ample evidence that WWC had a rational business purpose for these actions. The subsidiaries benefited from the cash management system because it avoided redundant expenses and simplified the acquisition of financing. Appellants' contention that WWC employed this system as a means of subterfuge is purely speculative.

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[22] Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Delaware and Montana also apply a similar formulation of the rule. Ski Roundtop, 658 P.2d at 1078; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

[23] Cede & Co. v. Technicolor, 634 A.2d 345, 361 (Del. 1993).

Second, appellants argue that WWC breached fiduciary duties of loyalty and care by improperly diverting non-wholly owned subsidiary assets to purchase PCS licenses and "incubate" VoiceStream. Again, this claim is speculative. WWC essentially acted as a lender by financially supporting the non-wholly owned subsidiaries when they were operating at a loss. Appellants did not provide material evidence that any cash flow from the non-wholly owned subsidiaries was actually diverted to VoiceStream. WWC presented evidence that it had ample financing from other sources to develop VoiceStream.

Third, appellants contend that WWC breached fiduciary duties of loyalty and care by entering into the TD Credit Facility, because the "Maximum Guaranteed Amount" clause, which limited the non-wholly owned subsidiaries' pledge of assets to "the amount of money received directly or indirectly" from the loan, failed to adequately protect their assets. This claim is purely hypothetical and lacks any showing of harm or detriment. WWC rationally needed the TD loan to financially support the subsidiaries as well as to support its PCS ventures.

Fourth, appellants claim that the conversion and restructuring of Billings and Midland breached WWC's duties of loyalty and care because WWC's ultimate goal was not to reap tax benefits, but to effectuate freeze-out mergers three years later. Again, this claim is purely speculative. WWC presented evidence that restructuring would avoid tax liabilities. Appellants were given notice, and the proposals were approved. If appellants wanted to fully explore

all of the potential legal consequences of the restructuring, including the possibility of a freeze-out merger, they could have attended the meetings or consulted counsel. There is no material evidence that WWC acted deceptively.

Fifth, appellants claim that the 2000 mergers and reverse stock split are self-dealing transactions that breached duties of care and loyalty. However, these actions were authorized by statute, and appraisal remedies are available. Appellants contend that appraisal is not an adequate remedy where the merger is tainted by fraud or misrepresentation; however, they have not provided evidence that the prices were so unfair as to constitute a breach of fiduciary duty.

Appellants argue that they are entitled to a constructive trust in VoiceStream profits, because WWC was unjustly enriched by unlawfully diverting non-wholly owned subsidiary assets to incubate VoiceStream. A constructive trust is an equitable remedy imposed when clear, cogent, and convincing evidence shows that a person holding title to property would be unjustly enriched if he did not convey it to the plaintiff.[24] This standard has not been met.

Breach of Contract. Appellants first argue that WWC breached the Billings and Midland partnership agreements by encumbering the non-wholly owned subsidiaries' assets via the TD Credit Facility. According to appellants, the combination of vague accounting practices, the centralized cash

[24] Baker v. Leonard, 120 Wn.2d 538, 547-48, 843 P.2d 1050 (1993) (citing Proctor v. Forsythe, 4 Wn. App. 238, 242, 480 P.2d 511 (1971)).

management system, and the "Maximum Guaranteed Amount" clause[25] in the TD Credit Facility effectively pledged the assets of Billings and Midland in their entirety. We disagree. The clause expressly limited the non-wholly owned subsidiaries' pledge of assets, and there is no evidence that appellants were actually harmed. Appellants also argue that the TD Credit Facility created liens on partnership assets for WWC's purposes rather than partnership purposes, because some of the proceeds were used to develop VoiceStream. But WWC maintained records showing the amounts of money owed to or by each of the subsidiaries, and the evidence shows that WWC used the TD loan to bolster the subsidiaries when they were operating in the red, as well as for other purposes.

Appellants next argue that the unaudited financial statements breached the Midland and Billings partnership agreements, which provide that "[t]he Partnership shall maintain proper books and accounts in accordance with generally accepted accounting principles. . . . [A]ll such books and accounts shall be audited by the Partnership accountants." But WWC's centralized books and accounts, which covered the finances of the entire network of companies, were audited annually. WWC was not required to separately audit each financial statement, as this would be redundant and expensive.

Appellants contend that the restructuring of Billings from a general

[25] The partnership agreements provide that "[n]o partner shall pledge . . . or otherwise encumber its Ownership Interest in the Partnership, unless . . . the encumbrance attaches solely to the subject Ownership Interest, and does not attach to any real, personal, or intangible property, equipment, or other asset of the Partnership."

partnership to a corporation, and of Midland from a general partnership to a limited partnership, breached the partnership agreements because they required liquidation of the assets upon dissolution, which is not satisfied by a sale to a related party for stock instead of cash. This argument relies on an unreasonably narrow and technical reading of the agreements. Both agreements explicitly permitted amending or modifying the partnership agreements, transferring control over the business affairs of the partnership, dissolution, and discretion over winding up the partnerships by management. Although the partnership agreements did not explicitly contain provisions relating to entity conversion/restructuring, this was not necessary for them to convert the subsidiaries to avoid tax liabilities given the broad authority in the partnership agreements to alter or dissolve the entities by supermajority vote.

Appellants argue that these alleged breaches of contract entitle them to specific performance of the forfeiture clauses in the Billings and Midland agreements. Because there was no breach of contract, forfeiture is not available.

Fraudulent Concealment. Appellants argue that WWC committed fraud by using unaudited financial statements that contained only summary data and conclusions; giving inadequate notice of the size and purpose of the TD Credit Facility loan; giving inadequate notice of the purpose and effect of restructuring the Billings and Midland partnerships; and failing to distribute income. The elements of fraud are: "(1) [a] representation of an existing fact; (2) its

materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the other party; (6) the other party's ignorance of its falsity; (7) the other party's reliance on the truth of the representation; (8) the right of the other party to rely upon it; and (9) consequent damage."[26] The plaintiff must prove these elements with "clear, cogent and convincing evidence."[27]

The trial court did not err in finding that there was no genuine issue of material fact regarding these claims. First, appellants were aware that the financial statements were unaudited because each had the word "unaudited" printed on the top of the first page. The unaudited financial statements were based on audited books, and there is no evidence that the statements contained material errors. Allegations that the statements were vague do not raise an inference that they were false or that WWC intended to conceal information. Second, there is no evidence that the TD Credit Facility notice was fraudulent. The notice stated that the loan was for the purpose of replacing existing debt, which it did accomplish. In addition, the "Maximum Guaranteed Amount" clause limited the potential impact on the subsidiaries' assets, and appellants have not shown any resulting harm or damages. Third, appellants have not demonstrated that the notices received regarding the restructuring of Billings and Midland were

[26] State v. Hardesty, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). Compare Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 872 A.2d 611, 628 (Del. Ch. 2005) (five elements of fraud in Delaware).

[27] Beckendorf v. Beckendorf, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

fraudulent. The notices stated that the conversion was for tax purposes and that appellants' interests in the companies would not be affected, in keeping with evidence showing that WWC was concerned with reducing tax liabilities and that the quantum of appellants' interests remained the same. In any event, WWC was not required to explicitly notify appellants of every potential legal consequence of restructuring. Fourth, although appellants claim that they had no way of knowing that company income was being distributed to WWC, they could have inquired at meetings or asked to inspect the books at any time. The evidence shows that WWC's distributions to itself were consistent with its ownership interest in the subsidiaries and were accounted for in the centralized cash management system. Appellants eventually received their proportionate distribution following the mergers.

Washington State Securities Act (WSSA). Appellants argue that the trial court erred in dismissing their WSSA claim on WWC's CR 12(b)(6) motion. "Whether a dismissal was appropriate under CR 12(b)(6) is a question of law that an appellate court reviews de novo."[28] Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief."[29]

Appellants contend that WWC violated WSSA by converting the Billings and Midland partnerships into corporations and then forcing them to accept a

[28] Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

[29] Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (quoting Orwick v. Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (internal quotation marks omitted)).

cash price for their shares through the freeze-out mergers. They claim that these transactions involved the purchase of stock by means of fraud or misrepresentation which induced them to refrain from preventing the misappropriation of assets from 1994 to 2000; deprived them of the right to make informed decisions regarding their appraisal rights in the short-form mergers; and prevented them from receiving their fair share of VoiceStream profits.

RCW 21.20.010 provides that:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[30]

WSSA is patterned after the federal Securities Act of 1933 and Securities Exchange Act of 1934,[31] and is construed to coordinate the interpretation and administration of chapter 21.20 RCW with related federal regulation.[32]

The trial court granted WWC's CR 12(b)(6) motion to dismiss on two separate grounds. First, the court ruled that WSSA did not apply because the mergers did not constitute an "offer, purchase or sale" of securities, where the minority shareholders' interest was eliminated by statutory procedures rather

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[30] RCW 21.20.010.
[31] Brin v. Stutzman, 89 Wn. App. 809, 832, 951 P.2d 291 (1998).
[32] RCW 21.20.900; Brin, 89 Wn. App. at 832.

than by purchase or sale. Accordingly, they had no investment decision to make because they had no choice in the matter.[33] Appellants do not contest this finding on appeal. Second, the court ruled that appellants failed to establish reliance on the alleged misrepresentations.

Appellants theorize that RCW 21.20.010 imposes strict liability regardless of reliance. We disagree. Our Supreme Court has held that to establish liability under RCW 21.20.010, investors must show that they relied on material misrepresentations in connection with the sale of securities.[34] Appellants' attempts to distinguish these cases are not persuasive.

Appellants also argue that their claims parallel Section 12(2) of the Securities Act of 1933, now codified as 15 USC § 77l(a)(2), which makes sellers liable to buyers for misrepresentation and which does not require proof of reliance to establish a claim. However, appellants' claims more closely parallel federal "Rule 10b-5" claims for damages caused by misrepresentation in connection with a purchase or sale of a security, which do not require proof of reliance.[35] Appellants contend that they were fraudulently deprived of their partnership interests in the conversion and then forced to dispose of their stock in the freeze-out mergers. This casts appellants as sellers, not as buyers, making Rule 10b-5 more analogous.

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[33] Howe v. Bank for Int'l Settlements, 194 F. Supp. 2d 6, 25 (2002).

[34] Hines v. Data Line Systems, Inc., 114 Wn.2d 127, 134-35, 787 P.2d 8 (1990); Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 109, 86 P.3d 1175 (2004); Shermer v. Baker, 2 Wn. App. 845, 857-58, 472 P.2d 589 (1970).

[35] 17 CFR 240.10b-5

Appellants further argue that reliance should be implied where the defendant fails to disclose a material fact.[36] They claim that their reliance on WWC's misrepresentations lulled them into not taking action when they could have taken steps to protect their interests. But they have not shown any material facts that would entitle them to relief on this claim.

Lack of Subject Matter Jurisdiction. Pro se appellant Lee McDonald argues that the trial court's rulings are void due to lack of subject matter jurisdiction. None of these arguments have merit. First, McDonald claims that the case could not proceed after defendants Chaudhuri and Linney were dismissed for lack of personal jurisdiction, because they were indispensable parties under FRCP 19. McDonald recites facts and allegations concerning WWC's buyout of Chaudhuri and Linney's interests, but fails to explain how their dismissal could have changed the outcome of this case. Second, McDonald argues that he was stripped of his holdings in the bankrupt General Cellular Corporation by a "fraud upon the court," thereby causing the bankruptcy court to lose subject matter jurisdiction. However, the bankruptcy of GCC is not at issue in this case. McDonald also implicates the court's dismissal of claims against defendant Hellman & Friedman in this alleged "fraud," but fails to explain how this affects subject matter jurisdiction. Third, McDonald contends that the court lost subject matter jurisdiction because the other represented plaintiffs chose to abandon the individual fraud claim. But strategic litigation decisions such as this

[36] Morris v. Int'l Yogurt Co., 107 Wn.2d 314, 330, 729 P.2d 33 (1986); Guarino, 122 Wn. App. at 109.

have no bearing on subject matter jurisdiction. Fourth, McDonald challenges Judge Hilyer's impartiality based on "a review of the exhibits." There is no evidence whatsoever that the judge acted improperly.

Appellants' claims are barred by the statute of limitations or by laches, with the exception of the Billings contract claims and the claims for breach of fiduciary duty regarding the 2000 freeze-out mergers. Those remaining claims fail on the merits.

AFFIRMED.

s/ Baker, J.

WE CONCUR:

s/ Becker, J. s/ Grosse, J.